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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 59.

CARL ALDO MARZANI, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND OTHER RELIEF.

OSMOND K. FRAENKEL,
120 Broadway,
New York, New York.

ALLAN R. ROSENBERG,
932 Bowen Building,
Washington, D. C.,
Attorneys for Petitioner.

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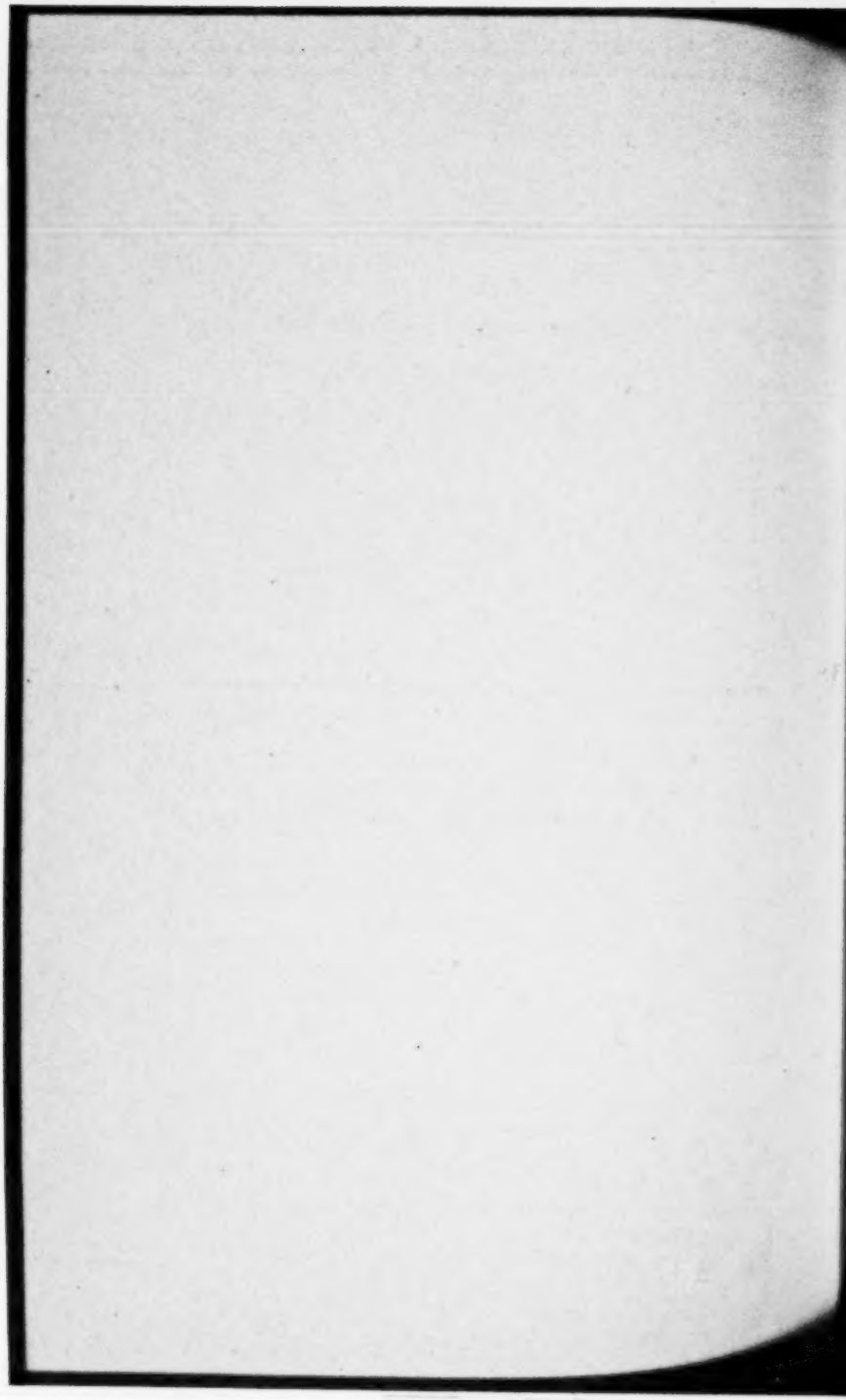

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THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND OTHER RELIEF.

Petitioner, Carl Aldo Marzani, respectfully presents his petition for rehearing and other relief, pursuant to the Rule 33 of the Rules of this Honorable Court, and submits the following reasons why his prayers should be granted:

I.

Petitioner was convicted of eleven separate violations of the False Claims Act (18 U. S. C. Sec. 80, now Section 1001). The court below held that prosecution of the first nine counts of the indictment was barred by the statute of limitations (R. 274-276, 277) but affirmed the judgment of the District Court on the ground that no prejudicial error was committed and that the sentence, which was general, could

be sustained on the remaining two counts, which it held good.

The questions presented by the petition for certiorari were:

(1) Whether the False Claims Act was applicable, and if applicable, constitutionally valid, as applied, in the prosecution of the false statements in Counts X and XI of the indictment.

(2) Whether the inclusion as issues on the trial, the admission of evidence, the instructions to the jury and the imposition of sentence relating to eleven counts of the indictment deprived petitioner of constitutional rights and substantially prejudiced him, in view of the holding, on appeal, that the first nine of the eleven counts were erroneously included in the indictment and erroneously submitted to the jury because barred by the statute of limitations.

(3) Whether petitioner was deprived of an impartial trial by a representative jury, by reason of the application by the trial court of a unique standard for the exclusion of admissible evidence, based on the trial court's apprehension that the predominantly Negro jury in the case could not consider the evidence on the same basis as any other representative jury.

Further questions raised by the government's brief on the writ and at oral argument before this Court were:

(4) Whether the decision of the court below, holding that the first nine counts of the indictment were barred by the statute of limitations, correctly construed the Suspension Act (18 U. S. C. Sec. 590(a)(1), now Sec. 3282), in view of the conflicting decision in *United States* v. *Gottfried*, 165 F 2d 360 (C. C. A. 2, 1948) cert. denied 333 U. S. 860.

(5) Whether the government, having opposed the granting of the petition for certiorari on all eleven counts, had standing to support the judgment on the last two counts

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by urging the reversal of the judgment below on the first nine counts.

In its Per Curiam Order of December 20, 1948, this Court affirmed the judgment of the court below, by an equal division, without opinion, Mr. Justice Douglas not participating in the consideration or decision in the case.

There has thus been no decision in the case, and no judgment has been announced authoritatively establishing any principle for the interpretation of the False Claims Act, the Suspension Act, and the constitutional and statutory provisions in respect to the questions presented. *Etting* v. *Bank of United States*, 24 U. S. 11; *Hertz* v. *Woodman*, 218 U. S. 205; *Hanifen* v. *Armitage*, 117 Fed. 845; *Lambros* v. *Young*, 145 F. 2d 341.

II.

This Court early in its history adopted the practice of requiring, if practicable, constitutional questions to be heard by a full court in order that the judgment in such case might, if possible, be the decision of the majority of the whole court.

In *Briscoe* v. *Commonwealth Bank of Kentucky*, 33 U. S. 8 Pet. 118 and *New York* v. *Miln*, 33 U. S. 8 Pet. 120, when the full Court consisted of seven members, this rule was announced by Chief Justice Marshall in the following language:

> "The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present case four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

The same cases were again called at the next term of court and the Chief Justice said the court could not know

whether there would be a full court during the term; but as the court was then composed the constitutional cases would not be taken up. 34 U. S. 9 Pet. 85. The rule laid down by Chief Justice Marshall has been frequently followed. See e. g. *Home Ins. Co. of New York* v. *New York*, 119 U. S. 129, 148, 122 U. S. 636, 134 U. S. 594, 597; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 586, 158 U. S. 601.

Nor has the rule been limited to cases of equal division, as a result of the illness of one of the justices, or a temporary vacancy, where the court could expect that a sufficient number of justices would ultimately be present to render a decision by majority vote. It has also been given effect in the analagous situation where so many of the justices disqualified themselves that the Court, because of the absence of a quorum, could not make final disposition of the case. Thus, in *United States* v. *Aluminum Company of America* and *North American Company* v. *Securities and Exchange Commission*, 320 U. S. 709 (1943) this Court said: "As four justices have disqualified themselves from participating in the decision in each of these cases, the court is unable to make a final disposition of them because of the absence of a quorum of six justices as prescribed by 28 U. S. C. A. Sec. 231 . . . These cases will accordingly be transferred to a special docket and all further proceedings in them postponed in each case until such time as there is a quorum of justices qualified to sit in it." Subsequently, one of the justices who had disqualified himself reconsidered his disqualification and participated in the decision in the *North American* case, which was ultimately decided by the Court with three of the justices who had previously disqualified themselves not participating in the decision. 327 U. S. 686, 711 (1946).

Similarly, the rule of disqualification has yielded to the necessity of decision in cases where the disqualification of the justices would prevent a determination of the proceedings. *Evans* v. *Gore*, 253 U. S. 245, 39 A. L. R. 1476; *Hirota* v. *MacArthur*, — U. S. —, decided December 6, 1948.

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III.

Mr. Justice Douglas did not participate in the consideration or decision in this case. As it turned out, his non-participation, the other justices being equally divided, led to the affirmance by the Court, without opinion, of the judgment below, and the resulting absence of decision or clarification of the constitutional and statutory questions presented.

Mr. Justice Jackson, although not present at oral argument either on December 8, or 9, 1948, participated in the decision in this case, with the resulting equal division of the Court.

In Mr. Justice Jackson's statement, concurred in by Mr. Justice Frankfurter, in the *Jewell Ridge Coal Corporation* case, 325 U. S. 897, it was said that a question relating to the qualification of one of the justices to take part in the decision of the cause is one which cannot properly be addressed to the Court as a whole, but should be addressed to the individual discretion of the justice involved. For this reason, the following suggestions are made both to this Honorable Court as a whole and to Mr. Justice Douglas and Mr. Justice Jackson, individually:

To Mr. Justice Douglas:

The Per Curiam Order of the Court in this case does not disclose the reasons for Mr. Justice Douglas' non-participation. Whatever those reasons may be, petitioner is completely satisfied that if Mr. Justice Douglas were to reconsider his non-participation and agree to hear and decide this case, petitioner would be accorded a scrupulously fair hearing and decision and, therefore, unconditionally and unqualifiedly waives any possible objection that might be raised to such participation. The outcome of such participation would necessarily result in a decision in this case by a majority vote. Petitioner suggests that the reasons which led the justice who disqualified himself in the *North Ameri-*

can case, *supra,* to reconsider his disqualifications and subsequently to participate in the decision in that case in order to meet the requirements of a quorum and the reasons which led to the Court as a whole in *Evans* v. *Gore, supra,* to take jurisdiction of the case, despite the individual relationship of members of the Court to the question there involved are equally applicable to a reconsideration by Mr. Justice Douglas of his non-participation in this case, in order to enable the court to decide the questions presented by majority vote. Petitioner, therefore, respectfully moves Mr. Justice Douglas to reconsider his non-participation and to agree to hear and participate in the consideration and decision of this case.

To Mr. Justice Jackson:

In the Japanese cases, (*Hirota* v. *MacArthur,* decided December 6, 1948) Mr. Justice Jackson stated " . . . it may be that fuller argument and hearing will convert one or more of the Justices on one side or the other from the views that have equally divided them in the German cases . . . I would not want to be responsible for eliminating even a faint chance of avoiding dissents in this matter."

The considerations which led Mr. Justice Jackson to cast the deciding vote in the Japanese cases are, we suggest, grounds upon which he may be moved to cast his vote to permit rehearing in this case. His absence from the oral argument in this case on December 8 and 9, 1948, deprived him of the opportunity to hear the oral presentation of the case by the parties, and thus deprived the parties of the opportunity to convert him, and through him, in the councils of this Honorable Court, one or more of the justices on one ~~said~~ side or the other from the views that have divided them. The function of oral argument is real and practical. See *State* v. *City of Milwaukee,* 157 Wis. at 511-2, 147 N. W. at 52-53. Wiener: Oral Advocacy, 62 Harv. L. Rev. 56 (1948) In cases where the Court is equally divided, oral argument may be critical, especially if the equal division of

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the Court turns on the vote of one justice who has not heard the argument. In cases where the opportunity for argument has been wholly denied, although the briefs are considered, the United States Court of Appeals for the District of Columbia has recently held: "*Dartmouth College* v. *Woodward*, 4 Wheat 518, 581 (U. S. 1819) (Webster's argument) and *Galpin* v. *Page*, 18 Wall 350, 368 (U. S. 1873) cited in the Wilson case, sufficiently attest that an essential element of due process is an opportunity to be heard before the reaching of a judgment, that judgment without opportunity to be heard is judicial oppression. *Londoner* v. *Denver*, 210 U. S. 373 (1908) *Morgan* v. *United States*, 304 U. S. 1 (1938) *Erie R. Co.* v. *Paterson*, 79 N. J. L. 512, 76 Atl. 1065 (1910), also cited in the Wilson case, attest that the due process guarantee of hearing includes an opportunity for argument". *W. J. R. the Goodwill Station Inc.* v. *F. C. C.*—App. D. C.—decided October 7, 1948 *L. B. Wilson, Inc.* v. *F. C. C.* —App. D. C.—decided April 12, 1948, 4 Pike and Fisher Radio Regulation 2001, 2056. In the practical, if not the constitutional sense, the lack of opportunity to make oral argument to one justice, whose subsequent participation in an equal division of the Court results in an affirmance, without opinion, on important constitutional and statutory questions presented, is, we submit, sufficient ground for the Court to grant, and for that justice to exercise his discretion to vote for a rehearing of the case.

If Mr. Justice Douglas agrees to reconsider his non-participation, Mr. Justice Jackson's vote to grant a rehearing will assure a decision by majority vote. If Mr. Justice Douglas refuses to reconsider his non-participation, there is still a likelihood that, if the Court grants and Mr. Justice Jackson hears the reargument, a decision may be reached by majority vote. The important reasons of policy which led to the adoption of the rule in the *Briscoe* and *Miln* cases, *supra*, which was followed in the *Home Ins. Co.*, *Pollock*, *North American* and *Evans* v. *Gore* cases, *supra*, are sufficient warrant for seeking that likelihood. See the

decisions of December 6, 1948 and December 20, 1948 in *Hirota* v. *MacArthur*.

For these reasons, we respectfully move Mr. Justice Jackson to agree to hear the case, and a majority of the Court to grant this petition for rehearing.

IV.

It is respectfully submitted that the case at bar imperatively requires the adoption of a rule which would lead to rehearing and final disposition of the case by majority vote of this Court. This case reached the Court by petition for certiorari, not on appeal. The review thus came to petitioner because at least four members of this Court deemed the specific questions presented to be of sufficient general importance to require decision by this Court. The Per Curiam Order of affirmance by an equally divided Court fails to supply that decision. Instead, it leaves the law in a state of confusion.

It is well settled that affirmance by an equally divided court concludes the parties but is not a precedent either in this Court or in the lower courts, that such an affirmance of one circuit court of appeals decision does not overcome the conflict with the contrary decision of another circuit and that each decision remains the rule in its own circuit. *Hertz* v. *Woodman*, 218 U. S. 205, *Hanifen* v. *Armitage*, 117 Fed. 845.

1. The Per Curiam Order of this Court leaves a conflict with respect to construction of the False Claims Act between the decision of the court below and the decisions of the Second and Fifth Circuits, and indeed in all other Circuits in which the question has been presented. It also casts doubt on the authority of the *Gilliland* case (312 U. S. 86) which all the lower courts have followed, with the exception, we submit, of the court below.

The court below held that the False Claims Act was applicable to punish false statements made in a private in-

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formal conference, even though such statements were not required by any law, rule or regulation (R. 292-293). The Government concedes that these statements were voluntary and not so required. "The short answer is that no information was required of petitioner and hence there obviously would be no applicable regulations. The Department of State did not seek information from petitioner. He volunteered it . . . " (Gov't. Brief, p. 68.)

In *Hamner* v. *United States,* 134 F. 2d 592, 595, one count of the indictment under the False Claims Act charged Hamner and others with concealment of tires. The decision of the Fifth Circuit was that Hamner's confederates "did make false bills and so fell afoul of Section 80" (The False Claims Act) but as to Hamner "we are referred to no regulation which required the tires to be kept at any particular place or exhibited to the Office of Price Administration. . . . This count charges no crime and should be stricken on demurrer". In *United States* v. *Presser,* 99 F 2d 819, 822 the Second Circuit approved the decision in *United States* v. *Long,* D. C. 14 F Supp. 29, dismissing an indictment under the False Claims Act, because "the weekly payrolls of the contractor were submitted by him voluntarily, when not required by law" (See other cases to the same effect in Petitioner's Brief, pp. 31-35).

The result is that false statements though made voluntarily, and not pursuant to any requirement in law, rules or regulations are punishable in the District of Columbia under the decision of the court below but are not crimes in any other circuit.

The decision of the court below with respect to the False Claims Act is, moreover, of the utmost importance in connection with the current loyalty investigation of the two million government employees, the hundreds of thousands of applicants for government employment, and the many millions of private citizens who deal with government agencies or are queried by government agents in connection with the loyalty program. The regulations of the Loyalty

Review Board, under Executive Order 9835 (12 Fed. Reg. 1935), the Hearing Procedures of the Personnel Security Board of the State Department, Rule XII and Departmental Circular 222 of the Civil Service Commission are all designed to avoid proved abuses in connection with loyalty investigations and to surround those investigations with as many procedural safeguards as were deemed feasible (See Petition for Certiorari pp. 17-20). The decision of the court below, which is applicable to the greatest number of persons involved in the loyalty program, is a complete negation of those safeguards. Under that decision, government employees who converse with their superiors on loyalty matters, outside the hearings to which they are entitled under the loyalty regulations, do so at the peril of going to jail, if they make false statements; and any false statement made by any person to a government employee on any "official" matter is punishable, under the decision of the court below, although the false statement is volunteered, and not required, in the kind of private, informal unregulated conversation for which petitioner was held punishable in the last two counts in this case. The likelihood of prosecutions for false statements made under these circumstances is not abstract. The Attorney-General has publicly announced his intention to use the False Claims Act, as construed by the court below, in additional prosecutions of the type of the Marzani case, as one method of proceeding against subversive groups.[1]

Also raised, and unresolved, is the important constitutional issue, arising from the undefined breadth of the statutory prohibition as applied in the last two counts (See *Winters* v. *New York*, 333 U. S. 507, Petitioner's Brief pp. 35-40).

2. The Per Curiam Order of this Court also leaves a conflict with respect to the Suspension Act between the decision

[1] Statement of Attorney General before the House Committee on Un-American Activities February 5, 1948, Department of Justice Press Release (p. 3).

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of the court below and the decision of the Second Circuit in the *Gottfried* case, *supra*. This conflict applies not merely to false statements made in respect to loyalty matters, but to the whole range of dealings by all persons with government agencies where false statements are made but no pecuniary or property loss to the government is involved. Under the decision of the Second Circuit in the *Gottfried* case, prosecutions may be had at least until December 31, 1949 for such false statements made as early as August 25, 1939. This results from the fact that the Act of August 24, 1942 suspended the running of the statute of limitations on crimes on which the statute had not already run—i. e. crimes committed on or after August 25, 1939—and the amendments to that Act continued the suspension until three years after the termination of hostilities in the present war. Since the President declared that termination on December 31, 1946 (12 Fed. Reg. 1), the suspension runs until December 31, 1949—a period of over ten years. Under the decision of the court below, however, prosecutions for such false statements are barred unless commenced within three years of the indictment. The result is that persons may be prosecuted in New York for crimes, prosecution of which is barred in the District of Columbia, and that until an authoritative resolution by this Court of this conflict is had, the government may fail to initiate timely prosecutions or persons who should not be prosecuted will be subject to the hardships of unnecessary criminal trials.

The Per Curiam Order of this Court also results in uncertainty in the administration of justice in connection with the treatment of juries in the District of Columbia (See Petitioner's Brief pp. 77-105 cf. *Frazier* v. *United States*, decided December 20, 1948); in the application of the "harmless error" rule, in connection with the admission of evidence of other irrelevant crimes (See Petitioner's Brief pp. 40-74); and in the practice before this Court of the Department of justice in seeking to support the judgment of the court below on the last two counts, by urging

reversal of the judgment of the court below on the first nine counts, although no cross petition for certiorari as to such counts was filed.

Notwithstanding the fact that the eight Justices who participated in the decision were upon first impression evenly divided as to the ultimate question of affirmance, it is hard to believe that they were evenly divided upon the many issues which the case presents. A number, if not all, of the issues, might be resolved by such further consideration as would be accorded by granting this petition for rehearing.

We submit that the questions which affect alike the liberty of petitioner and the administration of justice, in connection with the constitutional and statutory questions presented by the petition for certiorari, the government's brief, and the issues raised at oral argument are far too important to rest upon the cryptic line "Affirmed by an evenly divided court".

For the foregoing reasons, it is respectfully urged that this petition for rehearing and other relief be granted.

CERTIFICATE.

We, the undersigned attorneys for the petitioner above named, certify that the foregoing petition is presented in good faith and not for delay.

Respectfully submitted,

OSMOND K. FRAENKEL,
120 Broadway,
New York, New York.

ALLAN R. ROSENBERG,
932 Bowen Building,
Washington, D. C.,
Attorneys for Petitioner.

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